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Changes in the Constitution from the Perspective of the Hierarchy Rivalry Theory

Keywords: constitutional change, hierarchy, hierarchy rivalry theory, theory, revolution, invasion

Słowa kluczowe: zmiana konstytucji, hierarchia, teoria rywalizacji hierarchii, teoria, rewolucja, inwazja

Abstrakt

The hierarchy rivalry theory is based on the perception of social reality as a rivalry between associations and rivalry of systems of norms. The state constitution is a collection of tops of hierarchies. A constitution can be changed for various reasons – sometimes the change is an attempt to transform reality, and sometimes it results from the ruling party's attempt to maintain power. A constitutional change may be a revolution, understood as a process within the hierarchy, or an invasion resulting from external influence. The importance of the influence of ideology, but also of associations, on changes to the constitution should be recognized.

Streszczenie

Zmiany konstytucji w perspektywie teorii rywalizacji hierarchii

Teoria rywalizacji hierarchii bazuje na postrzeganiu rzeczywistości społecznej jako rywalizacji zrzeszeń oraz rywalizacji systemów norm. Konstytucja państwa to zbiór szczy-

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tów hierarchii. Konstytucja może być zmieniana z różnych powodów – niekiedy zmiana jest próbą przekształcenia rzeczywistości, a czasami wynika z dążenia do utrzymania władzy przez rządzącą partię. Zmiany konstytucji mogą przybierać formę rewolucji, rozumianej jako proces wewnątrz hierarchii, albo formę inwazji, wynikającej z zewnętrznego wpływu. Należy dostrzegać znaczenie wpływu ideologii, ale także zrzeszeń, na zmiany konstytucji.

The desire to change the constitution of a country may result from both the desire to compromise and the willingness to take into account the role of many hierarchies, and may also be an attempt to raise the importance or maintain the dominant position of one's own hierarchy. The issues of changing the constitution can be presented by discussing selected historical processes or formal legislative actions, but they can also be described through the use of metaphors. For example, metaphors for constitutional changes may use references such as changing the operating system or transforming the composition of a musical band, as well as other comparisons. Comparing the constitution to a pirate contract signed before joining the crew seems to be a risky operation, but if we take such a pirate code as a metaphor, it may be easier to show certain regularities² regarding the amendment of the constitution.

Both merchant and navy ships were organized hierarchically, putting the captain of top of decision making – also regarding crew member discipline. Comparison of feudal and authoritarian models used on merchant and navy ships makes pirates' ships look far more democratic. One of the elements, creating rights of individual pirates, were documents signed by persons joining a pirate undertaking. These codes set general rules regarding voting, obliging pirates to be ready to undertake tasks needed and forbidding various behaviours, for example gambling. Relation between a pirate captain and the quartermaster can be seen as an example of division of power. The captain was responsible for major decisions and took absolute power during fighting,

² P.T. Leeson, *Rationality, Pirates, and The Law: A Retrospective*, "American University Law Review" 2010, vol. 59, Issue 5, p. 1230.

as the quartermaster dealt with daily matters of the ship and in a way represented the crew³.

The changes were introduced during the preparation of the pirate code before the next voyage, and not during the trip itself. Of course, it is possible to imagine a change of such an agreement due to the noticing problems arising from some content of the code already during the trip, but nevertheless, the refinement of the content of the pirate code usually took place during the preparations for the expedition. Amendments to the country's constitution usually combine elements of a reaction to problems known from the past and the present, and preparations for the next stage of the state's existence.

Usually, issues related to the rivalry of world or local powers include or use selected ideological issues – examples of which may be, for example, the rivalry between the US and the USSR or between Iran and Saudi Arabia. The influence of world powers on changes to the constitution taking place in other countries may take the form of a trimming of a given constitution, but it may also consist in supporting some political forces or at least in the support of experts. Of course, following the example of other countries in terms of the adopted constitutional solutions may be perceived not only as a result of the actions of other countries, but also as a manifestation of looking for the best solutions. Constitutional changes are very interesting – also in countries such as the United Kingdom⁴ or San Marino⁵ – resulting from broadly understood processes of European cooperation in the field of recognition of human rights.

A special and frequently analyzed case of constitutional amendments are amendments to the Constitution of the United States of America. Children in American schools are taught that the realism of the authors of the constitution consisted, among other things, in striving for “more perfect union”, and not for a “perfect union”. Being aware of the existence of imperfections and taking them into account when creating a system is necessary to move

³ P.T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, “Journal of Political Economy” 2007, No. 6, p. 1072.

⁴ F.N. Forman, *Constitutional Change in the United Kingdom*, London-New York 2002, p. 370.

⁵ M.M. Wiszowaty, *Szlachectwo w republice i jego funkcje. Przypadek San Marino*, “Przegląd Prawa Konstytucyjnego” 2010, No. 1, p. 91.

away from wishful thinking toward realistic thinking, and it results in the creation of a judicial system in which the courts can also express their views on the interpretation of the constitution and the constitutionality of normative acts of lower rank, but also in the form of enabling changes to the constitution. The famous amendments to the American constitution sometimes become a more visible part of the constitution than many passages written in earlier parts of it.

The theory of hierarchy rivalry distinguishes two types of hierarchies. The first type are associations, the second are systems of norms. Changes to the constitution are related both to the rivalry of associations – even in the form of political parties or world powers, as well as to a number of issues concerning rivalry between systems of norms – which may take the form of ideologies or even political traditions. Often rivalry between norms and associations come together, and therefore associations can be a specific embodiment of a given ideology, which often includes orders and prohibitions, but also the activities of associations can bring results in the form of a system of norms. There is a noticeable paradox of condemning political parties and politics in general, with their fundamental role in shaping the reality in the country⁶. Likewise, whether it is trade unions, religious organizations or cultural associations, associations in general often meet both legitimate criticism and unrealistic expectations.

The Constitution, understood both as a written document and as a set of the most important norms in the country, in the perspective of the theory of hierarchy rivalry is seen as a set of the tops of the hierarchy and references to the tops of the hierarchy. The first case is when we find a specific norm in the content of the written constitution, which is the top of the hierarchy, while the second, when the content of the written constitution indicates other normative sources, e.g. concerning religion, freedoms or human rights. It is sometimes difficult to distinguish between creating a norm and referring to a norm that is the pinnacle of another norm system. We are dealing with such cases even when apparently autonomously created constitutional norms result from religious, economic and other views. One can generalize

⁶ R.J. Hardy, *The Paradoxes of Political Parties in American Constitutional Development*, Bloomington 2011, <https://www.civiced.org/pdfs/GermanAmericanConf2011/Hardy.pdf> (10.09.2020).

the views of various authors, and that is why it is easier to see their belonging to certain concepts within the theory of law, e.g. to the theory of natural law or to legal positivism, or to see the similarity of the views of these authors to the views of earlier authors. In this way, rivalries of certain philosophical traditions can be shown⁷.

One may wonder to what extent the constitution regulates or affects associations. On the one hand, constitutions may guarantee freedom of association in political parties, trade unions, religious organizations or cultural associations, but on the other hand, they may also indicate a large role of a dominant party or religious association. Regulations concerning associations can be treated as setting rules within which the society can function, but also as sealing and consolidating the existing state of affairs desired by the authorities.

Amendments to the content of the constitution regarding the permitted scope of affiliation can be treated as influencing social reality, but also as an element of political struggle. The constitutional majority sometimes consolidates its power by making it difficult for minority parties and groups to participate in real political rivalry. In this case, we can see a rivalry between associations in which changing the constitution is an instrument to maintain an advantage over opponents.

The importance of the elite in reacting to the social changes taking place may be reflected in their ability to take actions necessary to protect the state, but these elites may also focus only on the maintenance of power. Sometimes, instead of adjusting the system to the general needs, actions are taken to direct the attention of the society to other issues, e.g. related to foreign policy or related to shifting the blame for existing problems onto minorities⁸.

Just as the captain of a pirate ship must be able to make bold and right decisions, the country's political elite should have an understanding of military and economic issues as well as society's needs. However, while the common fate of officers and crew of a pirate ship helps in finding a common language,

⁷ R. Stacey, *Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process*, "International Journal of Constitutional Law" 2011, vol. 9, No. 3–4, p. 593.

⁸ G.A. Almond, *A Developmental Approach to Political Systems*, [in:] *Political System and Change*, eds. I. Kabashima, L.T. White, Princeton 1986, p. 69.

the material and cultural differences between political elites and wider societies make it difficult for the authorities to focus on solving the problems of the entire country. Dealing solely with the problems of the ruling social group or party, of course, is not appropriate only for the feudal system. In a democratic system, such a phenomenon is connected either with breaking the constitution, with shaping its interpretation in line with the interests of the ruling group, or with changing it. If the content of the constitution is brought into line with the needs of a narrow ruling group, we can talk about a departure from the principle of democratism toward the principle of legalism. Even a good constitution, badly used, is not a guarantee of stability, and sometimes the observation of social reality causes the conviction that the principles of democracy and of the rule of law are in conflict with one another⁹. Many facts related to the primacy of the constitution are not obvious¹⁰. In times of crisis, but also when resolving specific problems, the search for solutions may lead to attempts to amend the constitution, but more often governments and courts focus on finding arguments for the chosen interpretation of the constitution. Constitutional courts gain and lose respect because they are apolitical or politicized¹¹. Rivalry is a permanent element of the interpretation of the constitution, covering both the jurisprudence of courts and tribunals – including, in particular, supreme courts and constitutional tribunals¹² – but also wider processes related to shaping the jurisprudence, such as the appointment of judges, doctrinal views or even pressure from public opinion. Changes in the role of the courts with regard to issues of fundamental importance to the state system can also be seen as increasing or reducing the importance of the democratic factor at the expense of (nomen omen) elites¹³.

⁹ B. Zypries, *Weimar – die unterschätzte Verfassung*, [in:] *Die Weimarer Verfassung – Wert und Wirkung für die Demokratie*, ed. S. Lasch, Erfurt 2009, p. 23.

¹⁰ A. Kustra, *Współczesny paradygmat nadrzędności konstytucji*, "Studia Iuridica Toruniensia" 2008, vol. IV, p. 105.

¹¹ N.J. Brown, J.G. Waller, *Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges*, "International Journal of Constitutional Law" 2016, No. 4, p. 818.

¹² B. Daniels, B. Hudson, *Our Constitutional Commons*, "Georgia Law Review" 2015, vol. 49, p. 1018.

¹³ G.A. Tarr, *Explaining state constitutional changes*, "Revista de Investigações Constitucionais" 2016, No. 2, p. 14.

The criterion of derogation is sometimes indicated as a determinant of the ordering of normative acts within the hierarchy¹⁴. Nowadays, in most countries it is primarily political parties that decide on the changes to a constitution¹⁵, although, of course, the participation of citizens in the process of accepting or rejecting the proposed changes may be of great importance¹⁶. It should be remembered that political parties represent specific interests, so when considering external factors in the field of constitutional amendment, one may wonder to what extent a particular change is the result of specific international tendencies related to the rivalry of superpowers¹⁷, and to what extent economic or ideological issues are important¹⁸.

There was a difference between privateers¹⁹ and pirates in terms of their dependence or independence from the ruler. Pirates were self-employed and corsairs robbed foreign ships for their hiring ruler. A constitution can be created by the inhabitants of a given country, but sometimes it is imposed, e.g. after a lost war or by a power to whose sphere of influence a given country belongs. The rivalry of ideologies can be embodied in the attempts of superpowers to influence events in a given country. The results of the following events are reflected in the adopted constitutional solutions²⁰.

The constitution is to enable the permanent coexistence of given social relations – which may be perceived as perpetuating the dominance of the privileged class, but also as a framework for the clash of diverse social in-

¹⁴ B. Naleziński, K. Wojtyczek, *Problematyka kompetencji prawodawczych a kontrola konstytucyjności prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1993, Year LV - paper 1, p. 51.

¹⁵ A. Bisztyga, D. Wojtczak, *Teoretyczne i komparatystyczne uwagi o trybie zmiany konstytucji i jej preambuły*, [in:] *Dookoła Wojtek... : księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, eds. R. Balicki, M. Jabłoński, Wrocław 2018, p. 66.

¹⁶ R. Grabowski, *Partycypacja obywateli w procesie zmiany konstytucji w państwach europejskich*, "Przegląd Prawa Konstytucyjnego" 2012, No. 1, p. 52.

¹⁷ P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Warszawa 2013, p. 174.

¹⁸ A. Bień-Kacała, *Rewizja czy zmiana konstytucji? (Charakter prawny nowelizacji konstytucji z 1989 r.)*, "Studia Iuridica Toruniensia" 2010, vol. VII, p. 102.

¹⁹ J. Trzoska, *Gdański handel i żegluga wobec zmian układu sił w Europie podczas Wielkiej Wojny Północnej*, "Śląskie Studia Historyczne" 2010, No. 16, p. 54.

²⁰ L.G. Cerioli, *Roles and International Behaviour: Saudi–Iranian Rivalry in Bahrain's and Yemen's Arab Spring*, "Contexto Internacional" 2018, No. 2, p. 296.

terests²¹. As it is known, Sparta did not want to codify or write down laws in detail, more willingly using the advice of the oracle, on the other hand, one can see a connection between the increasing importance of cities for creation of constitutions²². The mere introduction of regulation of systemic issues in the form of a constitution can be perceived as a way of limiting the royal power²³.

Amendments to the content of the constitution may be created as a result of observation of the functioning of the authorities of one's own country, but they may also be an attempt to imitate other countries, in order to repeat their successes or to become similar in some dimension. The conformity of the content of the constitution with the actual functioning of the authorities in the country is related to the concept of the rule of law, but also to honesty and accuracy. The discrepancy between the content of the constitution and the actions of the country's authorities may result from low legal culture, from hypocrisy or from the adoption of the constitution only for public relations reasons.

One may wonder when the country's power becomes similar to pirates. The empire that exploits the colonies is certainly in some ways similar to the crew of a ship robbing another ship. However, if we look at the inner workings of the empire, we can also see that its elites have a certain profit from owning a colony, hence perhaps it is the elite of the power that can be perceived as the crew of a pirate ship. However, if we consider the economic and political elites of society to be close to the top of the social hierarchy, then the issues of distribution of goods within society can be regarded as an issue related to the internal affairs of the hierarchy. We intuitively sense that the support of the elite by the working classes, known from different eras, is also somewhat similar to the activities of pirates. The competition of pirate ships trying to rob a merchant ship is similar to the competition between world powers for colonies, and in this context changes to the material constitution of these powers can be seen as changes affecting the efficiency of external influence.

²¹ M. Goldoni, M.A. Wilkinson, *The Material Constitution*, "Law Society Economy Working Papers" 2016, No. 20, p. 18.

²² A. Ławniczak, *Geneza Konstytucji*, Wrocław 2015, p. 229–236.

²³ R. Małajny, *Geneza konstytucji*, "Annales UMCS" Sectio G, 2019, vol. LXVI, No. 1, p. 313.

While the first modern constitutions could be seen as attempts to free people from the miseries of feudalism, later constitutions were usually geared toward enabling society to function under capitalism or overcoming the limitations of this system by introducing socialism. The great importance of the struggle for the independence of countries liberating themselves from the status of colonies should also be noticed. One of the ways of justifying the aspirations for independence is the inability of an ethnic group to participate in governing the country²⁴. The metaphor of a code on a pirate ship shows the tendency to overcome limitations and to establish, through the new constitution, a reality more suited to the new authority. Certainly, constitutions can also be a form of realization of more conservative aspirations, limiting all unfavoured freedoms. The complexity of issues related to specific historical and political realities calls for caution in making assessments. The world of pirates, on one hand, is terrifying, and on the other, it is related to the idea of freedom – and similarly, political changes can arouse contradictory feelings.

In addition to using metaphors, the hierarchy rivalry theory uses certain assumptions, including two kinds of changes at the top of the hierarchy related to hierarchy competition. It should also be noted that there are changes related to internal processes within the hierarchy, so when analyzing a specific situation, one should pay attention to what perspective is taken into account and what factors actually determine the phenomena taking place. A change at the top of a hierarchy, resulting from the influence of another, stronger hierarchy, on a given organization or on a given system of norms, is called invasion, while a revolution is related more to the influence of internal factors. These two methods are in many cases related to each other in many ways, but it is often possible to indicate whether internal or external factors were directly decisive for the change of the system.

Exporting a revolution usually not only involves promoting a given ideology, but is also often associated with attempts to take power in a given country by forces favouring the foreign influence. On the other hand, the success of an invasion sometimes depends on the ability to find local allies, dissatisfied with the current balance of power in the country.

²⁴ O.S. Okojie, *Between Secession and Federalism: The Independence of South Sudan and the Need for a Reconsidered Nigeria*, "Pacific McGeorge Global Business & Development Law Journal" 2013, vol. 26, Iss. 2, p. 444.

According to the hierarchy rivalry theory, an individual belongs both to a given hierarchy and represents the hierarchy, either through his or her actions or by holding specific views – both of which are often combined, e.g. when a given religious or political organization binds people together and influences their views. Changes to the constitution may reflect social changes, including changes in the religious affiliations in the society or changes in political views. Revolution, understood according to the hierarchy rivalry theory as a change at the top of the hierarchy, is seen as a process within such a hierarchy, and may take the form of a change of power as a result of elections or of a coup. Revolutions regarding property relations or existing technology can also affect constitutional changes, both because of the necessity to adapt basic normative acts to social needs or reality, and because of the impact of changes on the application of the constitution. Although changes in interpretation are usually not treated as changes to the content of the constitution, they can significantly change the position of individuals and relationships in entire societies.

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